

APPEAL NO. 130837
FILED MAY 20, 2013

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 5, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 9th through the 15th quarters from December 31, 2010, through September 27, 2012; (2) the respondent (carrier) is relieved of liability for SIBs because of the claimant's failure to timely file an Application for [SIBs] (DWC-52) for the 9th through the 14th quarters from December 31, 2010, through June 13, 2012; and (3) the carrier did not waive its right to contest the claimant's entitlement to SIBs for the 9th through the 15th quarters by failing to timely request a benefit review conference (BRC). The claimant appeals the hearing officer's determinations. The carrier responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury], which resulted in an impairment rating of 15% or greater; (2) the qualifying periods for the 9th through the 15th quarters were from September 18, 2010, through June 15, 2012; (3) the claimant was unemployed during the qualifying periods for the 9th through the 15th quarters of SIBs; and (4) the claimant made no job search efforts during any of the weeks of the qualifying periods for the 9th through the 15th quarters of SIBs.

CARRIER WAIVER

It is undisputed that the carrier did not pay the 8th quarter of SIBs, and that the 8th quarter of SIBs was actively in dispute at the time the claimant filed his DWC-52 for the 9th quarter of SIBs. It is undisputed that the carrier received the claimant's DWC-52 for the 9th quarter on June 14, 2012. In order to avoid carrier waiver, the carrier had to timely request a BRC. See Section 408.147(b). The hearing officer states in the Background Information "[t]here is no evidence that would tend to show when [the] [c]arrier filed its request for a [BRC] to contest [the] [c]laimant's entitlement to [SIBs] for the [9th] quarter and the hearing officer is asked to speculate that [the] [c]arrier failed to request a [BRC] within [10] days of the date it received the application for the [9th] quarter." The hearing officer found that the evidence failed to establish when the carrier filed a request for a BRC to contest the claimant's entitlement to SIBs for the 9th quarter.

Section 408.147(b) provides as follows:

If an insurance carrier fails to make a request for a [BRC] within 10 days after the date of the expiration of the impairment income benefit period or within 10 days after receipt of the employee's statement, the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period of [SIBs].

28 TEX. ADMIN. CODE § 130.108(c) (Rule 130.108(c)) provides as follows:

Insurance Carrier Dispute; Subsequent Quarter With Prior Payment. If an insurance carrier disputes entitlement to a subsequent quarter and the insurance carrier has paid [SIBs] during the quarter immediately preceding the quarter for which the [DWC-52] is filed, the insurance carrier shall dispute entitlement to the subsequent quarter by requesting a [BRC] as provided by [Rule] 141 of this title (relating to Dispute Resolution—[BRC]) within 10 days after receiving the [DWC-52]. An insurance carrier waives the right to contest the entitlement to [SIBs] for the subsequent quarter if the request is not received by the Texas Department of Insurance, Division of Workers' Compensation within 10 days after the date the insurance carrier received the [DWC-52]. The insurance carrier does not waive the right to contest entitlement to [SIBs] if the insurance carrier has returned the injured employee's [DWC-52] pursuant to [Rule] 130.104(c) of this title (relating to Determination of Entitlement or Non-entitlement for Subsequent Quarters).

Rule 130.108(d) provides as follows:

Insurance Carrier Disputes; Subsequent Quarter Without Prior Payment. If an insurance carrier disputes entitlement to a subsequent quarter and the insurance carrier did not pay [SIBs] during the quarter immediately preceding the quarter for which the [DWC-52] is filed, the insurance carrier shall send the determination to the injured employee within 10 days of the date the form was filed with the insurance carrier and include the reasons for the insurance carrier's finding of non-entitlement and instructions about the procedures for contesting the insurance carrier's determination as provided by subsection (a) of this section.

In Appeals Panel Decision (APD) 051130-s, decided July 12, 2005, the Appeals Panel cited to APD 032868-s, decided December 11, 2003, which held that “when the

issue of entitlement to the prior quarter of SIBs is ongoing and the claimant submits a [DWC-52] for the subsequent quarter, the carrier must timely request a BRC if it wishes to dispute the subsequent quarter, and failure to do so results in waiver as provided in Section 408.147(b).” The Appeals Panel noted in APD 032868-s that “the proper approach, when the rule does not fit the factual situation is to return to the statutory provision in the 1989 Act-Section 408.147(b).” In APD 080242, decided April 7, 2008, there was an ongoing dispute of the 3rd quarter of SIBs at the time the DWC-52 for the 4th quarter was received by the carrier. In that case, there was no evidence that the carrier requested a BRC on entitlement to the 4th quarter of SIBs or that the carrier asserted that it did request a BRC to contest the 4th quarter of SIBs. The Appeals Panel reversed the hearing officer’s determination that the carrier did not waive the right to contest entitlement to the 4th quarter of SIBs and rendered a new determination that the carrier did waive the right to contest entitlement to the 4th quarter of SIBs. Subsequent Appeals Panel decisions have cited APD 032868-s, for the proposition that where the immediately preceding quarter is “actively under dispute” at the time the carrier receives the DWC-52, the carrier must comply with the provisions of Section 408.147(b). See APD 041362, decided July 27, 2004; APD 041726, decided September 2, 2004; and APD 070653, decided May 29, 2007.

In this case, the hearing officer erred in determining that the carrier did not waive the right to contest entitlement to the 9th quarter of SIBs. The carrier states in its response that the claimant failed to offer any evidence at the CCH showing when the carrier disputed the 9th quarter of SIBs, and that the claimant failed to carry his burden of proof that the carrier waived the right to dispute the 9th quarter of SIBs. The evidence showed that the carrier received the claimant’s DWC-52 for the 9th quarter of SIBs on June 14, 2012. It is undisputed that the 8th quarter of SIBs was actively in dispute on June 14, 2012, and there was no evidence that the carrier timely filed a request for a BRC to dispute entitlement to the 9th quarter of SIBs. Consequently, the carrier waived the right to contest entitlement to SIBs for the 9th quarter. The hearing officer’s decision that the carrier did not waive the right to contest entitlement to SIBs for the 9th quarter by failing to timely request a BRC is reversed and a new decision is rendered that the carrier waived the right to contest entitlement to SIBs for the 9th quarter.

As to the 10th through the 15th quarters of SIBs, the hearing officer’s determination that the carrier did not waive the right to contest the claimant’s entitlement to SIBs for the 10th through the 15th quarters by failing to timely request a BRC is supported by sufficient evidence and is affirmed.

ENTITLEMENT TO THE 9TH THROUGH THE 15TH QUARTERS OF SIBS

Given that we have reversed the hearing officer's carrier waiver determination and we rendered a new decision that the carrier waived the right to contest entitlement to SIBs for the 9th quarter, we reverse the hearing officer's determination that the claimant is not entitled to SIBs for the 9th quarter and we render a new decision that the claimant is entitled to SIBs for the 9th quarter based on carrier waiver.

The hearing officer's determination that the claimant is not entitled to SIBs for the 10th through the 15th quarters of SIBs is supported by sufficient evidence and is affirmed.

TIMELY FILING OF THE 9TH THROUGH THE 14TH QUARTERS OF SIBS

Section 408.143(c) provides that failure to file a statement under that section relieves the insurance carrier of liability for SIBs for the period during which a statement is not filed. Rule 130.104(c) provides in part that except as otherwise provided in that section, a DWC-52 shall be filed no later than 7 days before, and no earlier than 20 days before, the beginning of the quarter for which the injured employee is applying for SIBs. Rule 130.105(a) provides in part that: an injured employee who does not timely file a DWC-52 with the insurance carrier shall not receive SIBs for the period of time between the beginning date of the quarter and the date on which the form was received by the insurance carrier. The exceptions under Rule 130.105(a) do not apply to the facts of this case.

The 9th quarter of SIBs is from December 31, 2010, through March 31, 2011. Although the claimant is entitled to SIBs for the 9th quarter based on carrier waiver, the evidence established that the claimant did not file his DWC-52 for the 9th quarter until June 14, 2012; therefore, the claimant shall not receive the 9th quarter SIBs from December 31, 2010, through March 31, 2011. See APD 050280, decided April 6, 2005. That portion of the hearing officer's determination that the carrier is relieved of liability for the 9th quarter of SIBs because of the claimant's failure to timely file a DWC-52 for the 9th quarter from December 31, 2010, through March 31, 2011, is supported by sufficient evidence and is affirmed.

The 10th through the 13th quarters of SIBs period is from April 1, 2011, through March 29, 2012. That portion of the hearing officer's determination that the carrier is relieved of liability for the 10th through the 13th quarters of SIBs because of the claimant's failure to timely file a DWC-52 for the 10th through the 13th quarters from April 1, 2011, through March 29, 2012, is supported by sufficient evidence and is affirmed.

The 14th quarter of SIBs is from March 30 through June 28, 2012. As previously stated, the claimant filed for the 9th through the 14th quarters of SIBs on June 14, 2012. That portion of the hearing officer's determination that the carrier is relieved of liability for the 14th quarter of SIBs because of the claimant's failure to timely file a DWC-52 for the 14th quarter from March 30 through June 13, 2012, is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the hearing officer's determination that the claimant is not entitled to SIBs for the 10th through the 15th quarters of SIBs.

We affirm the hearing officer's determination that the carrier is relieved of liability for the 9th quarter of SIBs because of the claimant's failure to timely file a DWC-52 for the 9th quarter from December 31, 2010, through March 31, 2011.

We affirm the hearing officer's determination that the carrier is relieved of liability for the 10th through the 13th quarters of SIBs because of the claimant's failure to timely file a DWC-52 for the 10th through the 13th quarters from April 1, 2011, through March 29, 2012.

We affirm the hearing officer's determination that the carrier is relieved of liability for the 14th quarter of SIBs because of the claimant's failure to timely file a DWC-52 for the 14th quarter from March 30 through June 13, 2012.

We affirm the hearing officer's determination that the carrier did not waive the right to contest the claimant's entitlement to SIBs for the 10th through the 15th quarters by failing to timely request a BRC.

We reverse the hearing officer's decision that the carrier did not waive the right to contest entitlement to SIBs for the 9th quarter by failing to timely request a BRC and we render a new decision that the carrier waived the right to contest entitlement to SIBs for the 9th quarter.

We reverse the hearing officer's determination that the claimant is not entitled to SIBs for the 9th quarter and we render a new decision that the claimant is entitled to SIBs for the 9th quarter based on carrier waiver.

The true corporate name of the insurance carrier is **OLD REPUBLIC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge